STATE OF MICHIGAN

IN THE SUPREME COURT

DEPARTMENT OF TRANSPORTATION,

Plaintiff-Appellee,

Supreme Court No. 134798

v.

Court of Appeals No. 272560

INITIAL TRANSPORT, INC., and EMPLOYERS' MUTUAL INSURANCE COMPANY,

Wayne County Circuit Court No. 04-430645-ND

Defendants-Appellants,

and

GREAT WEST CASUALTY COMPANY and KIRK NATIONAL LEASING COMPANY a/k/a KIRK NATIONALEASE COMPANY,

Defendants.

_____/

BRIEF OF AMICUS CURIAE
ON BEHALF OF THE INSURANCE INSTITUTE OF MICHIGAN IN SUPPORT OF THE APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF QUESTIONS ADDRESSED

I. DOES THE MICHIGAN NO-FAULT ACT (MCL 500.3101, *et seq.*) PROVIDE THE EXCLUSIVE REMEDY AVAILABLE TO MDOT FOR THE PROPERTY DAMAGES IT SUSTAINED IN THIS CASE, PRECLUDING ANY RECOVERY UNDER THE MOTOR CARRIER SAFETY ACT ("MCSA"), WHICH IS STRICTLY REGULATORY IN NATURE AND FOR WHICH THERE IS NO PRIVATE CAUSE OF ACTION OR REMEDY FOR THIRD PERSONS?

Defendants-Appellants would answer, "Yes."

Plaintiff-Appellee, MDOT, would answer, "No."

Amicus Curiae IIM answers, "Yes."

A. **Does the MCSA implicitly amend the $1 million limit on recoverable property protection insurance benefits under the No-Fault Act, MCL 500.3121(5)?**

Defendants-Appellants would answer, "No."

Plaintiff-Appellee, MDOT, has answered, " No."

Amicus Curiae IIM answers, "No."

B. **Does the MCSA provide a private cause of action for negligence against the defendant motor carrier, or create an implied exception to the No-Fault Act's abolition of tort liability for motor vehicle-related property damage?**

Defendants-Appellants answers, "No."

Plaintiff-Appellee, MDOT, would answer, "Yes."

Amicus Curiae IIM answers, "No."

INTEREST OF AMICUS CURIAE

Pending before the Court is the Application for Leave to Appeal of Defendants-Appellants, INITIAL TRANSPORT, INC., and EMPLOYERS MUTUAL INSURANCE COMPANY, which seeks review of the published opinion rendered in this matter by the Court of Appeals, *Dep't of Transportation v Initial Transport, Inc*, 276 Mich App 318; 740 NW2d 720 (2007). In its two-to-one majority opinion, the Court of Appeals recognized an unstated statutory exception to the No-Fault Act's $1 million limit on property protection insurance benefits. MCL 500.3121(5).

Specifically, based on its perception that an "irreconcilable conflict" exists between the $1 million limit on no-fault property protection benefits and the minimum levels of financial responsibility required of motor carriers carrying hazardous materials under the Motor Carrier Safety Act ("MCSA"), MCL 480.11a(1)(b) (incorporating federal regulations, including 49 CFR 387.9), the Court of Appeals held that plaintiff is not limited to the $1 million maximum remedy provided by the No-Fault Act. Amicus Curiae, the INSURANCE INSTITUTE OF MICHIGAN ("IIM"), contends that this decision of the Court of Appeals is fundamentally wrong.

Yet the instant application necessarily addresses the validity of not one but two published decisions of the Michigan Court of Appeals. In addition to the case at bar, *Dep't of Transportation v Initial Transport, Inc*, *supra*, the more recent decision in *Dep't of Transportation v North Central Coop, LLC*, 277 Mich App 633; __ NW2d __ (2008), is unavoidably at issue, as well. In both cases, claims were asserted by MDOT for reimbursement of property damage caused by motor carriers regulated by the MCSA, MCL 480.11, *et seq*. In both cases, plaintiff MDOT sought reimbursement *beyond* the statutorily limited $1 million in

property protection insurance benefits that are available without regard to fault under the No-Fault Act, MCL 500.3121, *et seq.*; and in both cases, albeit under decidedly different analyses, the Court of Appeals held that the defendants were potentially responsible to MDOT for amounts exceeding $1 million -- either on grounds that the unconditional limit on recovery set forth in MCL 500.3121(5) was implicitly amended by the insurance coverage requirements of the MCSA, or on grounds that the MCSA's insurance coverage requirements implicitly amended the No-Fault Act's comprehensive abolition of tort liability for negligently caused property damage arising out of motor vehicle accidents. MCL 500.3135(3).

On behalf of its member companies, Amicus Curiae IIM believes that the Court of Appeals in both *Dep't of Transportation v Initial Transport* and *Dep't of Transportation v North Central Coop, LLC* fundamentally erred in finding "conflicts" between the MCSA and the No-Fact Act that simply do not exist and, as a consequence, creating a remedy that materially upsets the legislative balance struck as a matter of policy by our Legislature when it partially abolished motor vehicle-related tort liability in exchange for a comprehensive system of reparations for economic loss without regard to fault.

Amicus IIM is a government affairs and public information association that represents more than 90 property/casualty insurance companies and related organizations operating in Michigan. Its member companies provide insurance to approximately 73% of the automobile, 66% of the homeowner, 42% of the workers' compensation and 35% of the medical malpractice markets in Michigan. The IIM's purpose is to serve the Michigan insurance industry and the insurance consumer as a central focal point for educational, media, legislative and public information on insurance issues. As official spokesperson for the property/casualty insurance

industry in Michigan, the Association thus serves as a liaison between property/casualty insurance companies and state government.

Consistent with its purpose, the IIM and its member companies are interested in the correct construction and application of statutes pertaining to insurance, such as the statutes at issue in this case.

STATEMENT OF FACTS

Amicus Curiae, the INSURANCE INSTITUTE OF MICHIGAN ("IIM"), accepts and relies upon the Statement of Facts provided in Defendants-Appellants' Application Requesting Leave to Appeal.

ARGUMENT

I. THE MICHIGAN NO-FAULT ACT (MCL 500.3101, *et seq.*) PROVIDES THE EXCLUSIVE REMEDY AVAILABLE TO MDOT FOR THE PROPERTY DAMAGES IT SUSTAINED IN THIS CASE, PRECLUDING ANY RECOVERY UNDER THE MOTOR CARRIER SAFETY ACT ("MCSA"), WHICH IS STRICTLY REGULATORY IN NATURE AND FOR WHICH THERE IS NO PRIVATE CAUSE OF ACTION OR REMEDY FOR THIRD PERSONS.

Introduction

In this action plaintiff MDOT is seeking compensation for property damage that arose out of a tractor-trailer accident on a freeway in Detroit, Michigan. On October 6, 2003, a semi-tractor owned and operated by defendant, Initial Transport, was pulling a cargo tank trailer filled with gasoline. Proceeding on a ramp from northbound I-75 to eastbound I-94, the tractor-trailer combination struck the cement barrier along the connector ramp. The tank trailer flipped over,

fell onto the roadway below and exploded, resulting in extensive damage to the freeway overpass and related structures, as well as fatal injuries to the driver.

Plaintiff MDOT asserted claims against a variety of potentially responsible entities and insurers, including Initial Transport and its insurer, Employers Mutual Insurance Company ("EMC"), Defendants-Appellants herein. As against Initial Transport and EMC, MDOT sought property protection insurance benefits under the No-Fault Act, MCL 500.3121, *et seq.*, and additionally asserted tort claims for negligence and strict liability, citing the owner's liability statute, MCL 257.401 and the MCSA, MCL 480.11a(1)(b). The circuit court ruled that plaintiff's recovery of property protection benefits was limited to $1 million, MCL 500.3121(5), and granted summary disposition in favor of defendants on its alleged tort claims because any such liability was abolished by the No-Fault Act, where the financial security required by the No-Fault Act was in effect for the involved motor vehicle. MCL 500.3135(3).

There is no dispute that, at all times pertinent to this action, defendant properly maintained all insurance coverages required by law for the subject vehicle. Under MCL 500.3101(1), defendant was required to maintain "security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance." Vehicles registered in Michigan are required to be insured for motor vehicle liability in amounts of at least $20,000 for bodily injury or death to any 1 person in any 1 accident, $40,000 for bodily injury or death to 2 or more persons in any 1 accident, and $10,000 for damage to property in any 1 accident. Financial Responsibility Act, MCL 257.520(b)(2); Insurance Code, MCL 500.3009(1). There is no dispute that Initial Transport, through its insurance coverage with defendant EMC, fully complied with its coverage obligations under §3101(1).

As a motor carrier engaged in the transport of gasoline, Initial Transport also was required under the MCSA's adoption of 49 CFR 387, MCL 480.11a(1)(b), to maintain insurance coverage or its equivalent at least sufficient to satisfy liability for negligence in the amount of $1,000,000.[1] Again, there is no dispute that Initial Transport, through its insurance coverage with defendant EMC, fully complied with these coverage obligations.

The case now before the Court raises questions as to whether these insurance requirements of the MCSA have the effect of altering or creating exceptions to the otherwise clear dictates of the No-Fault Act, which (a) limit the availability of no-fault personal property insurance benefits to $1 million for any one accident and (b) abolish tort liability arising from the ownership, operation of use of a motor vehicle, except under specified circumstances not present here. In its order inviting supplemental briefs and directing that a hearing be scheduled in this matter, the Court requested argument on four questions:

> (1) whether the Motor Carrier Safety Act (MCSA), MCL 480.11 *et seq.*, provides a private cause of action or remedy for third parties;

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[1] Under 49 CFR 387.7(a), "No motor carrier shall operate a motor vehicle until the motor carrier has obtained and has in effect the minimum levels of financial responsibility as set forth in §387.9 of this subpart."

Under 49 CFR 387.5, the term "financial responsibility" means "the financial reserves (e.g. insurance policies or surety bonds) sufficient to satisfy liability amounts set forth in this subpart covering public liability."

Under 49 CFR 387.15, the mandatory insurance policy or its equivalent is required to cover "any final judgment recovered against the insured for ***public liability resulting from negligence*** in the operation, maintenance or use of motor vehicles..." (emphasis added). (*Accord*, MDOT's Supplemental Brief, 3/14/08, p. 10, at n. 32.)

The amounts of required coverage range from $750,000 to $5,000,000, depending on hazardous nature of the materials being transported. 49 CFR 387.9. There is no dispute in the case at bar that, based on its transportation of gasoline, defendant Initial was required to carry $1,000,000 in coverage. *See*, 276 Mich App at 324.

(2) whether the MCSA, at 480.11a, implicitly amended the cap on recoverable property damages found in the Michigan No-Fault Act, MCL 500.3101 *et seq.*, at MCL 500.3121;

(3) whether, if the cap has been amended by the MCSA, this has any relevance to this case, where the applicable financial responsibility amount found in the MCSA is apparently the same as the property damage cap established in the no-fault act; and

(4) whether the plaintiff is entitled to any penalty interest pursuant to MCL 500.2006.

(Order, 2/1/08). In this brief, Amicus Curiae IIM provides discussion principally limited to the first two questions, contending that the MCSA neither provides a private cause of action or remedy for third parties nor implicitly amends the cap on recoverable property damages set forth at MCL 500.3121(5). These questions are addressed here in reverse order, following the chronological sequence in which the at-issue Court of Appeals' opinions were issued.

First, in *Dep't of Transportation v Initial Transport, Inc*, 276 Mich App 318; 740 NW2d 720 (2007) (this case), the Court of Appeals held that the MCSA must be read as implicitly creating an exception to the No-Fault Act's $1 million cap on recoverable property protection insurance benefits. Then, in *Dep't of Transportation v North Central Coop, LLC*, 277 Mich App 633; __ NW2d __ (2008), the court held that the MCSA must be read as creating or giving rise to an exception to the No-Fault Act's abolition of motor vehicle tort liability so as to allow a common law tort action to proceed against the defendant motor carrier. As the following will show, and for the reasons well articulated by the dissenting judges in both cases, the conclusions in both cases are untenable.

Notably, with respect to the Court of Appeals' holding in the case at bar, plaintiff MDOT concedes that the majority erred in suggesting that the MCSA in any way affects the $1 million cap on property damages recoverable under the No-Fault Act (*see*, MDOT's Supplemental Brief,

3/14/08, pp. 9-10). MDOT asserts not that the no-fault PPI limits of §3121(5) are altered by the MCSA, but that the No-Fault Act's abolition of tort liability for motor vehicle-related property damage, §3135(3), is implicitly amended, or excepted, by the MCSA, as held in *Dep't of Transportation v North Central Coop, LLC, supra.* This Court should reject both propositions.

A. The MCSA does *not* implicitly amend the $1 million limit on recoverable property protection insurance benefits under the No-Fault Act, MCL 500.3121(5).

According to the majority opinion of the Court of Appeals below, the issue presented was "whether the Legislature, by adopting the MCSA and specifically MCL 480.11a, intended an exception to the $1 million limit on property protection insurance benefits contained in the no-fault act." *Dep't of Transportation v Initial Transport, Inc*, 276 Mich App at 324. The court addressed the financial responsibility requirements imposed on motor carriers by the MCSA, which mandate insurance coverage for potential liability, in amounts ranging from $750,000 to $5,000,000 depending on the nature of the materials being transported. From these coverage requirements, the court inferred a legislative intent not to limit persons suffering property damage at the hands of such a motor carrier to the $1 million available under §3121 *et seq.* without regard to fault:

> [T]he only reasonable purpose for requiring insurance is to effectuate coverage of risk[.] ... It follows that injured parties ought to be able to recover for property damage under the required policies. To rule otherwise would counteract the entire purpose of setting higher minium limits for transporters of hazardous materials.

276 Mich App at 328. The majority thus concluded as follows:

> A goal of the no-fault act is to ensure that automobile accident victims receive without regard to fault compensation for

> their injuries in the form of property protection insurance benefits. [Citation omitted.] The goal of the MCSA, in part, is "to assure that motor carriers maintain an appropriate level of financial responsibility for motor vehicles operated on public highways." 49 CFR 387.1; MCL 480.11a. These goals are not mutually exclusive; both provide the means for recompensing injury in the event of a motor vehicle accident. The MCSA is both more specific and more recent, and we hold that it creates an exception to the $1 million cap on damages established by the no-fault act. MCL 500.3121(5). We therefore conclude that the trial court erred in granting defendants' motion for summary disposition.

Dep't of Transportation v Initial Transport, Inc, 276 Mich App at 329 (emphasis added).

The majority's above conclusion, Amicus Curiae submits, is based on a materially false premise -- that both the No-Fault Act and the MCSA "provide the means of recompensing injury in the event of a motor vehicle accident." It is true that the No-Fault Act's property protection insurance provisions provide the means of recompensing certain economic losses suffered as a result of a motor vehicle accident, but nowhere in the MCSA nor in the regulations it incorporates are there remedies or procedures for pursuing and recovering compensation for damages. Setting minimum levels of financial security for potential tort liability does not constitute providing the means of recompensing injury; these are provided, if at all, by common law tort remedies.

The Court of Appeals in this matter thus concluded that §3121(5)'s $1 million limit on no-fault property damage claims does not apply to motor vehicles subject to the motor carrier regulations under the MCSA, even though the MCSA does not in any way purport to address the amount of insurance benefits available under the No-Fault Act. It nowhere refers to or even mentions the No-Fault Act. Moreover, while the federal regulations selectively incorporated into the Michigan act establish minimum levels of financial security to cover potential tort liability against operators of vehicles transporting hazardous materials, none of them address, purport to

regulate, or even mention state laws that provide for recovery of insurance benefits without regard to fault for losses arising out of motor vehicle accidents, like Michigan's No-Fault Act.

Amicus Curiae thus submits that there is no substantial basis for the proposition that, in passing the MCSA, the Michigan Legislature intended by implication to alter the $1 million limit in the No-Fault Act's property protection insurance provisions, MCL 500.3121.

To conclude otherwise, the Court of Appeals declared that there is an "irreconcilable conflict" between §3121(5) of the No-Fault Act and the insurance coverage requirements of the MCSA. Upon examination, however, such a conflict simply does not exist.

The task in construing a statute is to discern and give effect to the intent of the Legislature, and when statutory language is clear and unambiguous, it is deemed to reflect the legislative intent and must be enforced as written. *Shinholster v Annapolis Hosp*, 471 Mich 540, 548-549; 685 NW2d 275 (2004). The majority below did not quarrel with this proposition. Moreover, it affirmatively found that the statute at issue, §3121(5) of the No-Fault Act, "is unambiguous, limiting the payment of property protection insurance benefits to $1 million under one policy for damage to tangible property arising from a single accident." 276 Mich App at 324. It acknowledged that an ambiguity must exist before a court may "engage in judicial construction to ascertain the legislative intent." 276 Mich App at 325.

The majority, however, stated that an unambiguous statute can be rendered ambiguous through its interaction with another statute, provided the two provisions "irreconcilably conflict" with each other. 276 Mich App at 325 (quoting *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004) -- an otherwise unambiguous "provision of law is ambiguous ... if it 'irreconcilably conflict[s]' with another provision"). From this proposition, the majority proceeded to find that §3121(5) does "irreconcilably conflict" with the MCSA's requirement that

motor carriers of hazardous materials maintain $1,000,000 or even $5,000,000 in financial responsibility. If plaintiff in this case were limited to its $1,000,000 recovery under §3121(5) of the No-Fault Act, according to the court, the liability insurance requirements of the MCSA would be rendered "meaningless" and "entirely nugatory." Based on this premise, the court found the subject statute to be ambiguous:

> The issue we must address here is what happens when the no-fault act is read in conjunction with the MCSA. On the one hand, no more than $1 million can be paid out in property protection insurance benefits under the no-fault act, yet the MCSA demands minimum insurance coverage of $1 million or $5 million, depending on the hazardous material being transported. These statutes, when read independently, are unambiguous, but, create ambiguity when analyzed together.
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> . . . Put simply, if the damage cap is $1 million in all circumstances, then the $5 million minimum is meaningless, and we are not at liberty to render the MCSA entirely nugatory with such a ruling. Accordingly, we conclude that there is ambiguity between the statutes.

Dep't of Transportation v Initial Transport, Inc, 276 Mich App at 324-325.

The notion that any "irreconcilable conflict" exists between the No-Fault Act's $1 million limit on recovery of property protection insurance benefits and the insurance coverage levels required of motor carriers under the MCSA is simply wrong. The insurance required by the MCSA does not cover payment of PPI benefits under the No-Fault Act, it covers payment of judgments against the insured motor carrier for liability imposed on the carrier for damages caused by negligence. 49 CFR 387.5; 49 CFR 387.15 (*see*, note 1, *supra*, at p. 6).

Nor would enforcement of the No-Fault Act's $1 million limit on PPI benefits render the MCSA's liability coverage requirements "meaningless," since such coverage is still necessary to pay potentially large judgments for tort claims brought on behalf of persons suffering serious

bodily injury or death. The $1 million in PPI benefits under §3121(5) is entirely unavailable to a person suffering bodily injury. Such a claimant would be entitled to other benefits under the No-Fault Act, MCL 500.3107, *et seq.*, but also would be able to pursue a claim for damages against the at-fault carrier for negligence under the common law. Under such circumstances, the mandatory insurance coverage provisions of the MCSA would apply to protect such plaintiffs, since there would be financial reserves ("financial responsibility") for payment of up to $1 million or even $5 million for one accident, rather than the $20,000/$40,000 in coverage that otherwise would apply. MCL 257.520(b)(2); MCL 500.3009(1).

There is no "irreconcilable conflict," therefore, between the MCSA and the No-Fault Act's limit on PPI benefits, §3121(5), because enforcement of the unambiguous terms of §3121(5) does *not* render the coverage requirements of the MCSA "meaningless" or "nugatory." Since the holding of the Court of Appeals' majority opinion is dependent on the existence of such an "irreconcilable conflict," it cannot stand.

Importantly, Plaintiff-Appellee MDOT does not disagree. In both its Brief in Response to Application for Leave to Appeal, 10/5/07, pp. 20-22, and its Supplemental Brief in Response to Application for Leave to Appeal, 3/14/08, pp. 9-10, plaintiff MDOT rejects the proposition that the MCSA implicitly amended the cap on recoverable property damages under the No-Fault Act's PPI provisions. Yet such is the principal holding of the Court of Appeals in this matter. For all the reasons provided above, therefore, this Court should reverse the judgment of the Court of Appeals in this case.

B. The MCSA does *not* provide a private cause of action for negligence against the defendant motor carrier, or create an implied exception to the No-Fault Act's abolition of tort liability for motor vehicle-related property damage.

The position advocated by plaintiff MDOT in these proceedings is the one it successfully persuaded the Court of Appeals to adopt, in a two-to-one decision, in *Dep't of Transportation v North Central Coop, LLC*, 277 Mich App 633; __ NW2d __ (2008). There, the court proceeded from the prior decision rendered by the Court of Appeals in this case and held that the MCSA overrides the No-Fault Act's abolition of tort liability with respect to transporters of hazardous materials. 277 Mich App at 637. Amicus Curiae submits that plaintiff's position, along with the Court of Appeals' decision that supports it, lacks merit and should be rejected. The MCSA neither provides a statutory cause of action, express or implied, nor creates an implied exception to the No-Fault Act's abolition of tort liability with respect to motor carriers regulated under the MCSA.

Preliminarily, there is no substantial issue of whether the MCSA provides an express cause of action or remedy in favor of persons suffering injury or damages; it clearly does not. Its terms are entirely regulatory in nature. Through the federal regulations it incorporates, the MCSA provides procedures and standards for such things as workplace drug and alcohol testing (49 CFR 40; 49 CFR 382), routing regulations (49 CFR 356), driver qualification rules (MCL 480.12d; 49 CFR 390), limits on drivers' hours (49 CFR 395), fines and penalties (MCL 480.17; 49 CFR 387.17), and, most pertinent here, requirements for minimum levels of financial responsibility for motor carriers (49 CFR 387). Nowhere, however, do the MCSA or its incorporated regulations express a substantive cause of action in favor of injured parties against motor carriers or their insurers. Plaintiff MDOT does not suggest otherwise: "[T]he

MCSA does not contain a declarative assertion that an injured party may sue a motor carrier for its negligence" (Supplemental Brief in Response to Application for Leave to Appeal, p. 8).[2]

Plaintiff MDOT does argue that the MCSA provides for an implied private cause of action, but this likewise is untenable. Plaintiff relies on the elements articulated in *Gardner v Wood*, 429 Mich 290; 414NW2d 706 (1987), for the proposition that courts may infer a statutory cause of action in favor of injured parties where the statute is violated and no statutory remedy is expressly provided (MDOT's Supplemental Brief, p. 2). This Court recently discussed the *Gardner* test as follows:

> In *Gardner v Wood* [], the issue presented was whether a civil cause of action for damages could be maintained against a premises owner **for violation** of the bottle club act, MCL 436.26c. *Gardner* held that, when a statute is silent concerning whether a private remedy is available **for a statutory violation**, a court may infer a private cause of action "if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision. . . ."[]

Lash v Traverse City, 479 Mich 180, 192; 735 NW2d 628 (2007) (footnote citations omitted) (emphasis added).

The Court in *Lash* proceeded to articulate certain purposes a statute must have before "a cause of action could be created **to redress a statutory violation**" (emphasizing, however, that the purpose of the statute alone was an insufficient basis for inferring a private right of action). *Id*, at 192-193 (emphasis added). The glaring deficiency in plaintiff's argument here is that ***there***

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[2] Plaintiff's discussion goes on to assert, however, that in requiring insurance coverage for liability, the MSCA does provide a remedy: "The statute expressly provides a remedy for such injured parties while assuming that they may sue the owner or operator of the motor vehicle for negligence so as to qualify for that remedy." (MDOT"s Supplemental Brief, p. 8) (emphasis added). This statement is materially inaccurate. What is expressly provided in the statute is that carriers have the financial ability to pay a judgment, if and when a remedy might apply. It does not purport to dictate whether, or when, the governing state law will provide a remedy.

is no statutory violation in this case to be redressed. As has been discussed, among the various regulations adopted by the MCSA are those mandating that motor carriers maintain certain levels of liability insurance coverage. There has been no contention, however, that defendant Initial Transport failed to comply with these or any other of the act's requirements -- and as the Court of Appeals' majority acknowledged below, "A carrier is in compliance with the act once the minimum insurance is procured[.]" *Dep't of Transportation v Initial Transport, Inc*, 276 Mich App at 328.[3]

This case, therefore, does not even provide a basis for considering whether a cause of action could or should be created to redress a violation of the MCSA. In cases where the question has been raised, courts consistently hold that the motor carrier safety regulations do *not* give rise to an implied cause of action. Instead, whether an injured party is entitled to recover from the insured motor carrier always depends on the underlying substantive state law.

In *Parry v Mohawk Motors of Michigan, Inc*, 236 F3d 299 (CA 6, 2000), a terminated truck driver sued various parties alleging violations of a federal act that incorporated the drug and alcohol testing regulations of 49 CFR 40, which likewise are incorporated in Michigan's MCSA, MCL 480.11a(1)(b). After examining the "congressional intent" test for determining whether an implied right of action should be recognized in a federal statute, the court concluded that the incorporated regulations could not create a private right of action, and affirmed the grant

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[3] The opinion then adds, however, that "the penalties specified in the statute do not address what happens if an insurer declines to pay the amounts actually contained in the insurance policy[.]" *Id*, at 328. This is a curious statement. If a judgment is entered against the insured party and the insurer *then* "declines to pay," adequate procedures for enforcement of the judgment certainly exist in the form of collection and garnishment proceedings. Absent a legal obligation to pay, however, it makes little sense to note the absence of penalties for an insurer who "declines to pay." The absence of such penalties, in other words, does not advance the argument for a remedy to be judicially inferred from the provisions of the MCSA.

of summary judgment in favor of the defendants. *Parry*, 236 F3d at 308-309. In so holding, the Sixth Circuit joined other circuits that similarly rejected the invitation to recognize an implied cause of action based on violations of 49 CFR 40.[4]

In *Clark v Velsicol Chemical Corp*, 944 F2d 196 (CA 4, 1991), the plaintiffs sued for injuries they suffered from being exposed to insecticides that leaked from a five gallon drum they were transporting. They claimed that the defendants were negligent in the packaging and shipping of the chemical, contending that they violated federal regulations found at 49 CFR 171-180 (among those incorporated in Michigan's MCSA at MCL 480.11a(1)(a)). The district court dismissed the action on grounds that it did not raise a jurisdictionally sufficient federal question. Affirming the dismissal on appeal, the court discussed the distinction between a cause of action arising under the statutory regulations versus a state law negligence action that happens to involve alleged violations of the regulations:

> [Even assuming that plaintiff's view of the regulatory violation is correct], questions of causation and remedy, for example, would still be ones of state law, since no private federal cause of action has been provided. Application of the particular federal statute in this case would remain but an element in plaintiffs' state negligence action and cannot give rise to federal question jurisdiction. . . .
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> Plaintiffs cannot by artful pleading transform their state negligence action into a substantial federal question.

Clark, 944 F2d at 198-199. *Accord, Miller National Ins Co v Axel's Express, Inc*, 851 F2d 267, 270-271 (CA 9, 1988) (fact that the regulations under the Interstate Commerce Act mandate that motor carriers obtain certain security and make certain filings to assure financial responsibility

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[4] *Drake v Delta Air Lines, Inc*, 147 F3d 169, 170-171 (CA 2, 1998); *Schmeling v NORDAM*, 97 F3d 1336, 1343-44 (CA 10, 1996); *Abate v Southern Pacific Transp Co*, 928 F2d 167 (CA 5, 1991); *Saloman v Roche Compuchem Laboratories, Inc*, 909 F Supp 126, 128 (EDNY, 1995).

towards the public does not make a state law claim for recovery a federal question arising under the laws of the United States).

The case at bar, of course, does not involve an issue of whether a federal question exists, since the incorporated federal regulations are effectively part of the Michigan act, MCL 460.11a. The point remains, however, that, although these regulations require motor carriers to obtain certain levels of insurance to assure financial responsibility towards the public, they do not purport to dictate the extent to which a right of action exists against the insured motor carrier.

Accordingly, since no express cause of action is contained within the terms of the MCSA or its incorporated regulations, and since there is no alleged "violation" of any statutory provision here that could prompt a court to infer a statutory remedy, there is no merit to the assertion that the MCSA "provides a private cause of action or remedy for third persons" (MDOT's Supplemental Brief, p. 2).

Although MDOT's argument thus is based in part on *Gardner* and the notion of an inferred statutory cause of action, what MDOT ultimately advocates is that the MCSA should be construed as having amended by implication the No-Fault Act's abolition of motor vehicle-related tort liability at MCL 500.3135(3). Such was the holding of the Court of Appeals in *Dep't of Transportation v North Central Coop, LLC*, 277 Mich App at 637, 638.

Plaintiff MDOT argues that persons suffering property damage at the hands of a motor carrier regulated under the MCSA should be allowed to pursue a common law action for negligence (as well as a claim for ownership liability under MCL 257.401) (*see*, MDOT's Supplemental Brief, p. 7, at n. 21). While MDOT does not suggest that the MCSA expressly provides such a right, it contends that the MCSA's insurance requirements necessarily imply that, as against motor carriers regulated by the MCSA, there should be an exception to the No-

Fault Act's abolition of tort liability (MDOT's Supplemental Brief, pp. 7-8) (arguing that there would be "no need to *infer* a cause of action" if the Court would simply interpret the MCSA as "creating an exception to the abolition of tort liability in the no-fault act and allowing statutory [i.e., MCL 257.401] and common-law actions for negligence to proceed").

In response, Amicus Curiae begins with the text of §3135(3) itself:

> **Notwithstanding any other provision of law, tort liability** arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by section 3101 was in effect **is abolished** [except with respect to intentionally caused harm to persons or property, damages for noneconomic loss for death, serious impairment of body function, or permanent serious disfigurement, and certain other economic losses not compensated under the No-Fault Act].

MCL 500.3135(3) (emphasis added). This statutory language, Amicus Curiae submits, is unambiguous, and as such, it is deemed to reflect the intent of the Legislature and must be enforced as written. *Shinholster v Annapolis Hosp*, 471 Mich at 548-549; *accord, Dep't of Transportation v North Central Coop, LLP*, 277 Mich App at 649-650 (Zahra, J., dissenting).

From here, the analysis thus proceeds again to the question of whether this statutory language, clear and unambiguous on its face, "irreconcilably conflicts" with any provision contained within the MCSA so as to allow the judicial construction plaintiff MDOT seeks. In order to so conclude, MDOT acknowledges, the regulations adopted by the MCSA would need to be "rendered mere surplusage," "rendered nugatory." (MDOT's Supplemental Brief, pp. 7-8); *see, Lansing Mayor v Pub Service Comm*, 470 Mich at 166 (as discussed *supra* at p. 10).

Yet, contrary to the position necessarily advocated by plaintiff MDOT, the insurance coverage requirements of the MCSA are *not* rendered meaningless by full enforcement of both §3121(5) ("property protection insurance benefits ... shall not exceed $1,000,000.00") and

§3135(3) ("tort liability [for motor vehicle-related property damage] is abolished"). Quite simply, the subject regulations of the MCSA operate to increase the financial responsibility requirements, with respect to motor carriers under the act, from the otherwise applicable $20,000/$40,000 per accident for bodily injury and $10,000 per accident for property damage[5] to either $750,000, $1,000,000 or $5,000,000 per accident, depending on the material being transported, for whatever bodily injury *or* property damage liability might be imposed.[6] These provisions greatly increase the potential recovery of persons asserting claims against a motor carrier for bodily injury, and thus would not be rendered "mere surplusage" or "nugatory" by enforcement of the abolition of tort liability for property damage.

Moreover, to the extent that any tension might arise between the No-Fault Act's abolition of tort liability for property damage and any inference that the MCSA expects there to be such liability, the opening phrase of §3135(3) clearly eliminates any suggestion of an "irreconcilable conflict." At best, one could only argue that the competing provisions give rise to a "*reconcilable* conflict." As Judge Zahra stated in *North Central Coop, LLC*:

> Moreover, to the extent that the MCSA is inconsistent with the no-fault act, the majority ignores the introductory phrase of MCL 500.3135(3), which provides, "[n]otwithstanding any other provision of law . . . ." This legislative directive plainly instructs us to apply the no-fault provision abolishing tort liability over "any other provision of law . . . ." Thus, no tort liability can be created out of the MCSA if, as here, it arises "from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by [MCL 500.3101] was in effect. . . ." MCL 500.3135(3).

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[5] MCL 257.520(b)(2); MCL 500.3009(1). The $10,000 mandatory liability coverage for property damage remains in place despite §3135(3)'s abolition of such tort liability within Michigan. It continues to be relevant coverage for travel out of state.

[6] 49 CFR 387.5; 49 CFR 387.9; 49 CFR 387.15.

Dep't of Transportation v North Central Coop, LLC, 277 Mich App at 650 (Zahra, J., dissenting). Since §3135(3) thus does not irreconcilably conflict with the MCSA, its terms must be enforced according to their plain meaning; the judicial construction necessary for plaintiff MDOT's position to be accepted is prohibited because there exists no ambiguity in the statute.

Finally, it must be borne in mind that the availability and scope of a common law tort remedy for damages arising out of motor vehicle accidents, as balanced against the provision of benefits directly available without regard to fault for reimbursement of economic loss arising out of such accidents, were central elements in the collection of legislative policy decisions that comprised passage of the No-Fault Act. To accept MDOT's invitation to construe the MCSA's regulatory provisions as creating an exception to the No-Fault Act's partial abolishment of tort liability would do violence to the bargain reached with Michigan motorists who are required and entitled to have insurance coverage available at affordable rates.[7] It was the legislative balancing of these interests that led the Supreme Court in *Shavers v Attorney General*, 402 Mich 554; 267 NW2d 72 (1978), to uphold the No-Fault Act as valid:

> The Michigan No-Fault Insurance Act, which became law on October 1, 1973, was offered as an innovative social and legal response to the long delays, inequitable payment structure, and high legal costs inherent in the tort (or "fault") liability system. The goal of the no-fault insurance system was to provide victims of motor vehicle accidents assured, adequate, and prompt reparations for certain economic losses. The Legislature believed

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[7] Indeed, while MDOT's position would give both ends of the bargain to plaintiffs who suffer property damage at the hands of a commercial motor carrier -- the ability to sue in tort under the old fault-based reparations system *and* to recover up to $1 million dollars in PPI benefits without regard to fault, the position would do even more "violence" than this. If in fact §3135(3)'s partial abolition of tort liability were held not to apply in cases involving commercial motor carriers, then none of the No-Fault Act's other limitations on ability to sue would apply either. For example, a bodily injury plaintiff would be entitled to sue for both economic and noneconomic damages, without regard to whether serious "threshold" injuries were sustained and without regard to whether full no-fault "PIP" benefits likewise were being paid.

> this goal could be most effectively achieved through a system of *compulsory* insurance, whereby every Michigan motorist would be required to purchase no-fault insurance or be unable to operate a motor vehicle legally in this state. Under this system, victims of motor vehicle accidents would receive insurance benefits for their injuries as a substitute for their common-law remedy in tort.
>
> *The No-Fault Act, insofar as it provides benefits to victims of motor vehicle accidents without regard to "fault" (as a substitute for tort remedies which are, in part, abolished) constitutionally accomplishes this goal.*

Shavers, 402 Mich at 578-579 (emphasis in original).

Under the No-Fault Act, persons suffering bodily injury in motor vehicle accidents are entitled to reimbursement of much of their economic losses without regard to fault, MCL 500.3107; MCL 500.3108, but they give up the ability to sue for noneconomic damages -- except in cases of serious injury or death. MCL 500.3135. As noted above, when such claims are brought against motor carriers, the MCSA's financial responsibility requirements effectively enhance the potential for recovery of full compensation by providing substantially greater liability insurance limits than would otherwise apply. And although the same cannot be said of property damage victims, since under the No-Fault Act they give up their ability to sue for damages in a common law negligence action altogether, under the No-Fault Act property protection insurance coverage is mandated at the level of $1 million, and these benefits are payable without regard to fault. MCL 500.3121, *et seq.*

As Judge Whitbeck observed in his dissenting opinion below, it is certainly true that an accident caused by a motor carrier transporting hazardous materials can result in property damage exceeding the $1 million no-fault act limit. "But it is within the power of the Legislature, and not this Court, to create an exception to the $1 million property-damage limit for motor carriers if such an exception is indeed deemed warranted," *Dep't of Transportation*

v Initial Transport, Inc, 276 Mich App at 340-341. The carefully crafted trade-off of tort actions based on fault in exchange for a more assured but sometimes limited recovery was a balance the Legislature was permitted to strike. *Shavers, supra.*

CONCLUSION

This Court should reject plaintiff MDOT's invitation to endorse the judicial legislation that produced the majority opinions in both *Initial Transport* and *North Central Coop.* The terms of the No-Fault Act's $1 million limit on property protection insurance benefits, §3121(5), as well as the terms of the Act's partial abolition of motor vehicle-related tort liability, §3135(3), are clear and unambiguous. Neither provision irreconcilably conflicts with the MCSA or its adopted regulations, since, as has been demonstrated, none of that Act's financial responsibility provisions would be rendered "nugatory" or "meaningless" by faithful application of the No-Fault Act as written.

The MDOT cases here at issue, *Initial Transport* and *North Central Coop*, were wrongly decided, and should be reversed and overruled, respectively, for the reasons stated in each of their dissenting opinions.

RELIEF REQUESTED

For all of the foregoing reasons, Amicus Curiae, the INSURANCE INSTITUTE OF MICHIGAN, requests that this Honorable Court grant the application for leave to appeal and provide plenary review of the issues presented; or, in lieu of granting leave to appeal, render peremptory relief reversing the judgment of the Court of Appeals and reinstating the trial court's grant of summary disposition for defendants.

Respectfully submitted,

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